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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. —

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

L. WIEMANN COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the judgment entered in this case by the United States Circuit Court of Appeals for the Seventh Circuit on November 12, 1943.

OPINIONS BELOW

The findings of fact and conclusions of law entered by the district court are printed at R. 197–201. The opinion of the district court (R. 191–197) is reported in 52 F. Supp. 131. The opinion of the circuit court of appeals (R. 211–219) is reported in 138 F. (2d) 602.

JURISDICTION

The judgment of the circuit court of appeals was entered November 12, 1943 (R. 219–220). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether employees in the central warehouse of a chain of retail stores located in a single State, who are engaged in receiving, checking, repacking, and shipping to the retail stores goods purchased outside the State in response to prior requests from the stores, are engaged in interstate commerce within the meaning of the Fair Labor Standards Act.

2. Whether clerical employees in the central office building and warehouse of a chain of retail stores located in a single State, who are engaged in ordering goods from outside the State, in checking invoices of interstate shipments and in doing other clerical work related to the business of the chain, are engaged in interstate commerce within the meaning of the Act.

3. Whether warehouse and clerical employees in the central warehouse and office building of a chain store system extending to several cities in a single State are "engaged in a retail or service establishment" and therefore exempt under Sec-

tion 13 (a) (2) from the wage and hour provisions of the Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201 are set forth in the Appendix, p. 15, *infra.*

STATEMENT

This case arises on a complaint filed by petitioner, the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act, praying for an injunction restraining respondent from continuing to violate the Act (R. 2–6).

The facts found by the district court may be summarized as follows:

Respondent owns and operates a chain of 16 retail novelty stores located in the State of Wisconsin, four in Fond du Lac, Green Bay, Racine, and Madison, and twelve in Milwaukee (R. 197). Between 80 and 85 percent of the merchandise sold in these stores is purchased outside the State (R. 198).

Separate from the retail stores respondent maintains a central office building and warehouse. Respondent's general offices are located in this building; its accounts, records, correspondence, *et cetera,* are handled there. All respondent's buying activities are controlled in the central

office. Requests for merchandise to be sold in a retail store are made out by its manager in the form of orders from lists of manufacturers supplying respondent and are forwarded to respondent's officers in the central office.[1] There the requests are approved or disapproved. If the opportunity exists, an approved request from one store will be consolidated with similar requests from other stores and a new order on the manufacturer made out; otherwise the request prepared by the store manager, upon approval, is sent on as an order to the manufacturer. (R. 198–199.)

As stated above, most of the goods sold by respondent come from outside the State. About 80 percent is shipped directly to the stores but the other 20 percent is delivered to the central warehouse. (R. 198.) In the warehouse the goods are checked, repacked for the separate stores, and shipped to them in accordance with the approved requests from their managers (R. 199). The average stay of goods in the warehouse is approximately ten days. Shipments of merchandise are received at the warehouse and sent out to the stores almost daily. (R. 200.)

Two groups of employees employed in the warehouse and central office are involved in the

[1] In its business respondent spoke of these requests made by the managers of the retail stores as "orders" and they were made up in that form (see e. g., R. 13). However, to avoid any possibility of confusing them with an order placed with a dealer by a customer, we shall call them "requests."

instant case. The first group is the warehousemen. They receive incoming shipments after the goods are unloaded, unpack and check them against invoices, place them in bins assigned to the retail stores, and repack and ship them to the stores. (R. 199.) This work is "necessary to the receipt of merchandise at the warehouse and to the distribution and transfer of the merchandise to the individual stores" (R. 199).

The second group of employees involved is composed of the clerical employees in the central office. Part of their work—something less than 20 percent—consists of making out orders and paying for interstate shipments of goods to the stores and warehouses. In addition, they check the invoices of incoming goods against the orders and note on the invoices the retail price to be charged so that it may be communicated to the retail stores by the warehousemen. Their other work consists of taking dictation, typing letters, bookkeeping, preparing inventories, insurance, and tax reports, *et cetera.* (R. 200.)

Upon the foregoing findings of fact the district court concluded (1) that the warehousemen and probably the clerical employees in the central warehouse and office building were not engaged in interstate commerce within the meaning of the Act; and (2) that both groups of employees were exempt under Section 13(a)(2) because respondent's "retail stores and the general office and

warehouse building together constitute a single retail establishment whose selling is wholly in intrastate commerce at retail" (R. 191–197, 201).

On appeal the circuit court of appeals affirmed (R. 220). The court placed its decision chiefly on the ground that none of the employees were engaged in interstate commerce but it also approved the district court's interpretation of Section 13 (a) (2) (R. 218–219).

REASONS FOR GRANTING THE WRIT

The instant case is a companion case to *Walling* v. *Block*, No. 682, this Term, in which a petition for a writ of certiorari has recently been filed. The *Block* case presents the question whether employees in a central warehouse serving a chain of retail stores located in several States are exempt from the wage and hour provisions of the Act under Section 13 (a) (2) as employees "engaged in a retail or service establishment." The instant case, although it also involves the exemption issue, presents in addition the question whether such warehouse and central office employees engage in interstate commerce by handling merchandise coming from outside the State which is to be immediately distributed within the State to the chain of retail stores.[2] The two cases together

[2] It is possible that the respondent in the *Block* case may also raise an interstate commerce question even though the circuit court of appeals assumed that the employees were engaged in commerce within the meaning of the Act.

should be largely determinative of the applicability of Sections 6 and 7 to employees in the warehouses or central offices of chain store companies.[3]

The importance of this general problem is pointed out in our petition for a writ of certiorari in the *Block* case and needs no elaboration here. It affects directly almost 2,500 chain store organizations having warehouses and central offices in which more than 100,000 employees are engaged; their pay roll in 1936 was $200,000,000. (Census of Business, 1939.) A large proportion of these employees are undoubtedly employed in occupations similar to the occupations of the warehouse and clerical employees involved in the instant case. It is indicative of the importance of the question that at the last term the American Retail Federation filed a brief *amicus curiae* on the interstate commerce aspect of the question alone, on behalf of 13 National and 27 State retail trade associations.[4]

1. In its determination of the commerce questions the court below misapplied the decision of this Court in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and rendered a decision in conflict with the decision of the Circuit Court of Appeals

[3] There is an additional exemption for employees employed in a local retailing capacity (Section 13 (a) (1)), but since the Administrator has defined that exemption by regulation under express statutory authority, few problems arise in connection with it.

[4] The brief was filed in *Walling* v. *Jacksonville Paper Co.*, No. 336, October Term, 1942.

for the Third Circuit in *Walling* v. *American Stores Co.*, 133 F. (2d) 840.

In this field it is clear that the purpose of the Fair Labor Standards Act was to extend federal control throughout the farthest reaches of interstate commerce. Congress has exercised its authority, once goods enter such commerce, "over the entire movement of them until their interstate journey was ended." (*Walling* v. *Jacksonville Paper Co., supra,* 568). When goods come into a State from outside and are subsequently sent on to another destination within the State, the pause in the warehouse and the latter leg of the journey may be either part of the interstate transportation or purely local activities according to the characteristics of the business involved. The critical question is whether "practical continuity of movement" exists. If it exists, the whole journey is interstate. If it does not exist, the interstate commerce ends at the warehouse. In the *Jacksonville* case, moreover, the Court emphasized again the applicability of the principle stated in *Swift & Co.* v. *United States,* 196 U. S. 375, 398,[5] and held that the propriety of ruling that continuity of movement existed depended upon what the course of business shown in the record revealed.

[5] In that case Mr. Justice Holmes said, "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."

Applying these principles we argue in *Walling* v. *James* v. *Reuter, Inc.*, No. 436, this Term, that rapidity of turn-over—especially when coupled with such facts as the wholesaler's use as overnight storage places of the refrigerated freight cars in which the goods were received—is sufficient to sustain a trial court's finding that the goods did not come to rest in the wholesaler's hands. A quite different course of business, but one which also made it clear that there was continuous interstate transportation through a warehouse, was before the Circuit Court of Appeals for the Third Circuit in *Walling* v. *American Stores Co., supra.* The evidence there (133 F. (2d), at 845) showed that goods were ordered from outside the State and brought to a chain store warehouse in anticipation of the carefully programmed demands of the local retail stores, and then flowed in an even, constant stream to the stores for which they had been purchased.[6] The Circuit Court of Appeals for the Third Circuit held that under such circumstances the goods continued "in commerce" until they reached the retail stores (*id.*, at 845–846).

The instant case is still another illustration showing that practical continuity of movement may exist even though the journey is made up of two legs. The goods were brought to respond-

[6] It did not appear that there was any prior order or understanding showing that particular goods were predestined for a particular store.

ent's warehouse not to be held there, not for sale, nor for processing, but as a convenient step in their transportation from out-of-State manufacturers to specific retail outlets. Indeed, the instant case is even stronger than the *American Stores* case, for the original movement of the goods depended not upon anticipation of future demands but on a decision to fill actual, approved requests already made by the individual stores. The cases cannot be distinguished on the ground, suggested by the court below, that the *American Stores* chain was engaged in some processing at other locations, for plainly that fact is immaterial in determining whether the employees at the warehouses were engaged "in commerce."

In brief, the court below wholly failed to give effect to what we conceive to be the broad and practical principles established by the *Jacksonville* case. The conflict between the Third and Seventh Circuits as to the application of that decision to chain store warehouses should be resolved by this Court.[7]

2. The decision below is also inconsistent with the specific rulings made by the Court in the *Jacksonville* case in applying its underlying principles. The record in that case showed that the wholesaler imported merchandise from outside the State to fill specific orders from its

[7] The Sixth Circuit appears to have taken the same position as the Seventh. *Allesandro* v. *Smith Co.*, 136 F. (2d) 75.

customers; the goods were taken into the warehouse, checked by the wholesaler's employees and moved on to the customers on whose orders the purchase was made. The Court ruled that the goods continued to move in commerce until they reached the customers, saying (p. 568):

> * * * if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain "in commerce" until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended.

Other classes of merchandise were purchased for particular customers not on special orders but on a general prior understanding that the wholesaler would supply their requirements. The Court held that these goods also remained in commerce until they were delivered to the customers (p. 569)—

> The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate.

The instant case is governed by these rulings, even if they be viewed as the limits of the decision. Respondent's warehouse was merely a convenient point through which to funnel a prearranged steady flow of goods from the out-of-State manufacturers to the retail stores. Respondent's prac-

tice, it will be recalled, was for each store to submit to its central office requests for merchandise in the form of orders. When requests were approved, they were sent to out-of-State manufacturers, or if requests from several stores could be combined, a new order was made up for the total amounts requested. Then, when the goods arrived at the warehouse, the approved requests were filled by forwarding them to the stores. This course of business makes it clear that "the halt in the movement of the goods [in the warehouse] is a convenient intermediate step in the process of getting them to their final destinations," (317 U. S., at 568). It was understood from the beginning of the interstate movement that the goods were to go to the store from which the request had come. At all times, respondent's record of the requests approved, "like a special order, indicates where it was intended that the interstate movement should terminate" (317 U. S., at 569).

The circuit court of appeals distinguished the *Jacksonville* case on the ground that the requests for merchandise made by respondent's retail stores were not "prior orders" from customers but merely recommendations made by respondent's employees to its officials in the central office as part of the operation of a single business. The distinction is unsound. Even on the most narrow reading of the *Jacksonville* case the "prior orders" were important only because they estab-

lished that the intended movement was not ended at the warehouse but at the place of business of the customer. The general contracts and understandings pursuant to which the wholesaler procured the requirements of specific customers from outside the State were significant because they also showed that the goods shipped did not reach the prearranged destination of their interstate journey until delivery was made to the customer. And the Court suggested that evidence of a course of business based on anticipation of the needs of specific customers might be the equivalent of proof of prior orders, doubtless because in many cases it too would show a practical continuity of movement interstate. In short, when goods are brought into a State for distribution from a warehouse, one method of establishing a practical continuity of interstate movement is to prove that the goods pause in the warehouse as a convenient step in transporting them to prearranged destinations and do not come to rest there to be held until their sale can be arranged. Prior orders, contracts, understandings, and courses of business based on anticipation of customers' needs are important not as such but because they constitute such a showing. In the instant case the evidence of respondent's course of business is equivalent proof. Its practice of approving specific requests from retail stores and then importing goods to fill the approved requests shows that there is a practical continuity of movement from the manu-

facturer to the goods' prearranged destinations in the retail stores.

3. The other question presented is whether respondent's warehouse and office building and 16 separate retail stores constitute together "a retail or service establishment" within Section 13 (a) (2). For the reasons stated in our petition for a writ of certiorari in *Walling* v. *Block, supra,* the decision of the court below on this issue also conflicts with the decision of the Circuit Court of Appeals for the Third Circuit in *Walling* v. *American Stores Co., supra,* and raises a question important in the administration of the Act, which should be decided by this Court.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

DOUGLAS B. MAGGS,
Solicitor of Labor.

FEBRUARY 1944.